

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,241

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare terminating her ANFC benefits. The issue is whether the petitioner's son has or had a disability as defined by the federal Americans with Disabilities Act (ADA), and, if so, whether his failure to graduate high school by age nineteen was due to that disability.

FINDINGS OF FACT

The petitioner is the mother of a son who turned eighteen years of age on November 21, 1994. At that time, the petitioner's son was a full-time high school student who was not scheduled to graduate until January, 1996, two months after his nineteenth birthday.

In November, 1994, the Department notified the petitioner that her ANFC was being terminated due to her son turning eighteen and not being expected to graduate high school by age nineteen. The petitioner appealed this decision, and due to several continuances agreed to by the parties her ANFC benefits continued through June, 1995, when she waived their continuance in order that her appeal be continued further while she attempted to obtain further evidence of her son's disability, and while she explored the possibility of her son pursuing an accelerated school program that would enable him to graduate prior to his nineteenth birthday. The petitioner has received GA benefits since her ANFC was terminated, and she, herself, has applied for SSI disability benefits.

In October, 1995, the petitioner's son left school, without graduating. The hearing in this matter was held on November 13, 1995. The petitioner concedes that she cannot be found eligible for ANFC as of the date her son was no longer a full-time student. The issue in this matter is whether the petitioner was eligible for ANFC from the time her son turned eighteen (November, 1994) to the time he ceased being a full-time student (October, 1995).

The evidence in this matter includes extensive documentation of the student's academic history, going back to pre-kindergarten evaluations in 1981 and concluding with a comprehensive evaluation conducted in May, 1995. The record also contains the written and/or oral testimony of professionals who

participated in a special education evaluation of the student in 1991, and the oral and written testimony of a clinical psychologist who recently reviewed the student's school records.

The student's academic records reflect that he began kindergarten in a school in Connecticut in 1981, when he was not yet five years old. At the end of his first school year he was placed on an Individualized Education Program (IEP) and repeated kindergarten. His primary problems at that time were noted to be speech/language deficits and emotional problems.

The petitioner moved to Vermont in 1984, during her son's second grade year, where he was placed on an IEP for speech services. At the end of that year the school recommended that her son repeat second grade, which the petitioner refused. It does not appear that the student received special education services after the second grade.

The records show that the student made steady progress during elementary and into junior high school, but that his academic performance was consistently and chronically below grade level. In 1990, during the student's eighth grade year, the records show a drop-off in academic performance, an increase in absenteeism, and problems participating in gym class. These problems appeared to grow worse that year, and in late Spring, 1991, the school referred the student for special education.

The student's "comprehensive evaluation" at that time included a psychological assessment and extensive "psycho-educational" testing. Although these evaluations noted specific emotional problems and several areas of academic achievement deficits and recommended that specific accommodations be made for the student in school, they did not yield a diagnosis sufficient in the school's mind to qualify the student for special education services.

Unfortunately, it appears that once the student was determined to be ineligible for special education services the school did not evaluate the student's eligibility for "504 services" (see infra) as a handicapped student, and implemented few, if any, of the academic accommodations suggested by the evaluators.⁽¹⁾

In his ninth and tenth grade years the student failed or dropped several required courses and fell behind in the amount of credits he would need to graduate with his class. By the time he was into what-would-have-been his senior year in 1994 he was enrolled in a largely vocational program, which, although better suited to him in terms of interest and ability, would not furnish him with the amount of credits necessary to graduate at the end of that school year. When the student turned eighteen in November of 1994 the Department determined that his graduation status did not qualify the petitioner to continue to receive ANFC.

The psychologist who performed the psychological evaluation of the student in May, 1991, submitted a letter dated August 10, 1995, in which she stated that based on her evaluation of the student in May, 1991, the student had some "clinically handicapping factors" that affected his behavior and academic performance and merited specific accommodations in his school program.

The educational consultant who administered the psycho-educational testing of the student in May, 1991, submitted a letter in the petitioner's behalf and also testified in person at the hearing. In her letter, dated July 27, 1995, the consultant concluded:

My testing and informal assessment of [student] was intended to ascertain both his cognitive learning style and present levels of achievement in reading, math, written language, and general knowledge areas. While I try to present my result and impressions in such a way so as to facilitate the Basic Staffing Team's job, often I observe issues that are not specifically within my domain. When such an occasion occurs I defer to other evaluation components that should be considered as being of core importance to the Basic Staffing Team's decision making process. Such was the case with [student].

My findings regarding [student] cognitive ability showed that he demonstrated some limitations with his automatic processing speed as well as significant issues with mental organization. [Student] also demonstrated significant inconsistencies in his ability to attend and concentrate on tasks - particularly as the level of organization and production within tasks increased. These difficulties appeared to ripple across all academic areas but were of particular significance on tasks requiring the conceptual organization and production of oral and written language. In conjunction with my evaluation results and direct observations of a student, interpretation of test results should also take into account the variety of case history factors that comprise a student's experience.

My file review of [student's] past school performance and anecdotal records (i.e. teacher comments in progress reports, home/school correspondence maintained within school files) suggested that there were concerns regarding [student's] social adjustment and consistency in school performance and learning efficiency dating back to his elementary school years. Because the types of cognitive processing issues that [student] demonstrated can be directly impacted upon and/or indicative of social/emotional factors, my recommendation was that the Basic Staffing Team give careful consideration to the findings of [name], Mental Health consultant who was conducting [student's] projective psychological evaluation. My discussions with [consultant] and review of her findings suggested that emotional factors were playing a considerable role in [student's] profile at that time.

While clinical parameters acknowledge that handicapping issues often co-occur, such is not always the case within categorical guidelines for special services. For example: the "exclusionary clause" for LEARNING DISABILITIES presumes that in order for a child to be determined as "eligible" for services in this category they must show that their underachievement is not attributable to any other condition(s). As you know, while this guideline helps to narrow the procedural "gate" that marks entrance into Learning Disabilities or special education programs, this criteria often works at cross purposes to clinical and instructional support for students with multiple aspects to their learning problems. Thus, while a student may not clearly "fit" the criteria for "eligibility" under IDEA as determined through Vermont State Guidelines, that does not necessarily mean that they are not handicapped from a clinical perspective.

While it may be difficult to separate out how much of [student's] processing limitations were related to emotional factors and what proportion may be due to bona fide "learning disabilities", it is this examiner's opinion (as it was at the time of the evaluation) that [student] demonstrated cognitive-processing limitations that showed a direct relationship to his ability to function in oral language and academic skill areas. The types of errors that were demonstrated within his oral language and school skills were consistent with what would be expected given his difficulties with organization and automatic processing speed and fluency. Therefore, it is my opinion that these issues represented clinically handicapping factors for [student] - regardless whether or not his test scores "fit" a particular categorical profile under the then current state guidelines. Insofar as school staff articulated concerns regarding [student's] social adjustment and organization for academic performance, this examiner recommended that significant modifications, accommodations, and assistance be provided to [student] to

help him cope with the impact of his learning problems. Further, [student's] difficulties appeared to have been long-standing issues within his academic case history.

(Emphasis in the original.)

At the hearing, the consultant essentially reiterated the above conclusions and stated unequivocally that in her opinion, whether or not he should have been found eligible for special education, the student clearly had disabilities that met the ADA and Section 504 definitions, and that it was because of these disabilities, and the lack of accommodations provided by the school to overcome them, that the student's academic performance and school attendance suffered, causing him to be unable to complete the requirements for graduation before the end of the 1994-95 school year. She also opined that the student's disabilities would have prevented him from being able to successfully complete a rigorous accelerated schedule of required courses that would enable him to graduate before he turned nineteen in November, 1995. The consultant is a recognized expert in conducting disability assessments, and her testimony was essentially uncontroverted.

In a letter dated April 7, 1995, a clinical psychologist, also with expertise in making evaluations of disability, who reviewed the student's records at the request of the petitioner's attorneys submitted the following comments:

In my professional opinion, the 1991 testing previously referenced does qualify [student] as seriously emotionally disturbed. Certainly he was manifesting inappropriate behaviors and feelings, and an inability to learn which was inexplicable by intellectual, sensory, or health factors. Perhaps the basis for rejecting him for Special Education at that time was that the conditions had not been "exhibited over a long period of time". However, it is now 1995, [student's] school performance has deteriorated even more, and there is no indication in the records that his emotional problems have been further identified or treated.

At the hearing, this psychologist reiterated the above opinions. Again, this testimony was uncontroverted.

In May, 1995, while this fair hearing was pending, the school conducted another "comprehensive evaluation" of the student. The testing was conducted by another psychologist, and included another psychological and psycho-social assessment. Again, the school concluded that the testing did not support a conclusion that the student was eligible for special education services, but it did find certain academic deficits (most clearly in the area of math) and some lingering emotional problems, and it recommended that accommodations be made in the student's educational program to address these needs. The report specifically noted that the student had matured a great deal since 1991 and that as a result he had better self control and no longer exhibited behavior problems.

Based on the above report, the school implemented a program for the student's Fall 1995 school term that included several classroom accommodations based on the student's academic and emotional needs. The school also specifically advised against the student taking a rigorous accelerated program that would enable him to meet the requirements for graduation prior to his nineteenth birthday in November, 1995. As noted above, however, the student dropped out of school in October, 1995.

ORDER

The Department's decision is reversed.

REASONS

The Department does not dispute that if the petitioner's son's failure to graduate high school prior to his nineteenth birthday was due to a "disability", as defined by the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794, or Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12132, the Vermont Supreme Court's decision in Howard et al v. Dept. of Social Welfare, Docket No. 93-342 (Dec. 30, 1994) (reinstating the Human Services Board decision in Fair Hearing Nos. 11,260 et al) requires that the petitioner remain eligible for ANFC as long as her son is eighteen years old and remains a full-time student.⁽²⁾

A disability is defined under Section 504 and the ADA as "a physical or mental impairment that substantially limits one or more of the major life activities," or "a record of such impairment". 28 C.F.R. § 35.104. The regulations expressly recognize specific learning disabilities and emotional problems as impairments and learning as a major life activity.

Based on the uncontroverted expert evidence noted above, it must be concluded that whether or not the petitioner's son was eligible for special education services, he had a disability under the ADA and Section 504 that was directly responsible for his failing several courses in his ninth, tenth, and eleventh grades of high school, which in turn was the sole reason he was unable to graduate high school before his nineteenth birthday.

Thus, it must be concluded that the factual burden of proof required of the petitioner under Howard et al, supra, is met, and the Department's decision in this matter is reversed.⁽³⁾

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1. By law, schools are required to provide necessary accommodations to "Section 504" handicapped students (see *infra*) even if those students do not meet the eligibility criteria for special education. See Vermont Special Education Regulations § 1251.
2. See WAM § 2301.
3. The petitioner has also filed a request for attorneys' fees. The hearing officer will consider that request separately.